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Supreme Court, U.S.
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No. 08-483

In the Supreme Court of the United States

STEVEN J. HATFILL, M.D.,
Petitioner,

v.

THE NEW YORK TIMES COMPANY,
NICHOLAS KRISTOF,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

CHRISTOPHER J. WRIGHT*
THOMAS G. CONNOLLY
MARK A. GRANNIS
TIMOTHY J. SIMEONE
CHRISTOPHER P. NIERMAN
HARRIS, WILTSHIRE & GRANNIS LLP
1200 18th Street, N.W.
Washington, DC 20036
(202) 730-1300
* *Counsel of Record*

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In its opposition, The Times reargues the facts and ignores the conflicts with this Court's precedents and those among the circuits. With respect to the facts, The Times' largely fictional account is particularly misplaced because The Times obtained summary judgment and factual disputes must be resolved in Hatfill's favor.

Fundamentally, however, this petition is not about disputed facts, but about the Fourth Circuit's failure to apply proper legal standards. With respect to whether Steven Hatfill is a public figure, the lower court found it unnecessary to consider whether Hatfill thrust himself into the "particular" controversy concerning who committed the anthrax murders because, years earlier, Hatfill had criticized our country's lack of preparedness for a bioterrorism attack and Nicholas Kristof referenced that broader issue in his columns. The Times concedes, Opp. 27-28 n.17, that under the Fourth Circuit's approach an expert on any subject may be falsely accused of murder (absent actual malice) if the article accusing him addresses the broader issue on which he is expert. That holding eviscerates the "particularity" requirement established in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

With respect to "actual malice," The Times refuses to defend the court of appeals' bizarre holding that a defamation plaintiff must establish that the false accusations at issue were "*completely* fabricated" in order to establish malice. Pet. App. 25a (emphasis by the court). This strange ruling prevented the lower court from even considering Hatfill's evidence of malice. But The Times defends the summary judgment

as if the court: (1) had actually considered all the evidence; and (2) were permitted to do so in the light most favorable to the *moving* party. The Times has nothing to say in response to our showing that the decision below is contrary to this Court's decision in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), and conflicts with other circuit court cases. *See Rebozo v. Washington Post Co.*, 637 F.2d 375 (5th Cir. 1981); *Crane v. The Arizona Republic*, 972 F.2d 1511 (9th Cir. 1992); and *Tavoulareas v. The Washington Post Co.*, 817 F.2d 762 (D.C. Cir. 1987) (*en banc*).

Now that the Department of Justice has exonerated Hatfill, it is absolutely clear that The Times *falsely* accused him of the anthrax murders. The Times does not dispute that even its supposed bioterrorism expert, Barbara Rosenberg, had never heard of Hatfill before those murders. And it is plain that Kristof *partially* fabricated the allegations implicating Hatfill in the killings. Because the Fourth Circuit's decision conflicts with precedents of this Court and other circuits, certiorari should issue to review the lower court's public figure and actual malice holdings.

I. THE FOURTH CIRCUIT'S HOLDING THAT HATFILL IS A PUBLIC FIGURE WARRANTS REVIEW.

1. In *Gertz*, 418 U.S. at 341, the Court struck a balance to prevent media self-censorship while preserving "the individual's right to the protection of his own good name." A central feature of *Gertz*'s balance is that when analyzing limited-purpose public figure status courts must identify the *particular* public controversy giving rise to the defamation. *See id.* at

345. Hatfill has consistently maintained that, under *Gertz*, "any general public debate concerning the nation's preparedness for biological attack" in which he participated in 1997 and 1998 is "*not* the 'particular' public controversy giving rise to the defamation," Pet. 12, which concerned the 2001 anthrax murders.

The Times demonstrates that the Fourth Circuit paid lip service to *Gertz*, but that is not the same as following it. Below, Hatfill argued that under *Gertz* the court should first identify the "'particular' public controversy giving rise to The Times' defamation of Hatfill," and then consider Hatfill's role, if any, in "*that* controversy." Hatfill Br. 24-26. The Times disagreed, "argu[ing] that ... [*Gertz*'s] 'use of the word "particular" signifies only that a court must identify the specific or "particular" controversy or controversies fairly addressed *by the publication* at issue before determining whether the plaintiff had voluntarily participated in the controversy so identified.'" Pet. App. 19a (emphasis added and citation omitted). The lower court "agree[d] with" The Times and found that the articles concerned "the government's efforts to protect the nation from a bioterrorist attack." *Id.* at 20a, 21a. In short, at The Times' urging the lower court defined the controversy to correspond to the subject on which Hatfill had made public appearances years earlier, and found that he could therefore be falsely accused of the anthrax killings (absent actual malice) even though he had not thrust himself into the particular controversy concerning the attacks.

But there is a fundamental difference between identifying the controversy *giving rise to the defamation* (as *Gertz* requires), and identifying the controversies "fairly addressed *by the publication*" (as the lower court did). Hatfill's petition presented hypotheticals illustrating why the lower court's approach "has dire implications for public discourse." Pet. 13. Specifically, any expert may (again, absent actual malice) be falsely accused of any crime related to his area of expertise, so long as the publication includes discussion of the broader issues as well as the crime. *See id.* at 14.

The Times' opposition acknowledges that these "dire consequences" *do* flow from the Fourth Circuit's adoption of its arguments. Specifically, The Times argues – as it must, to defend the Fourth Circuit's decision – that an expert on gun control "would surely be a public figure for purposes" of an article accusing him of a gun crime regardless of whether he had thrust himself into the controversy concerning the crime. Opp. 27-28 n.17. To make this sound less outrageous, The Times assumes an article "reporting" that the gun expert committed a heinous crime. But, of course, that is not the proper frame of reference. The issue posed by the "public figure" category is whether a reporter would be entitled (absent actual malice) to *falsely* accuse a gun expert of a gun crime with which he had no connection merely *because* he participated in an earlier debate about gun control.

The Times is wrong in contending that this issue involves only "application of law to fact." *Id.* at 24. Under the legal standard adopted by the court below,

as long as a defamer mixes in some discussion of broader issues, gun experts may be falsely accused of shooting people for criticizing gun control, nuclear weapons experts may be falsely accused of terrorist acts, and so on. The particularity aspect of the legal standard set forth in *Gertz* prevents these absurd results and preserves the *balance* between protecting the press and protecting individual reputations. In contrast, the lower court's conflation of broad societal debates with particular controversies giving rise to defamation eviscerates the legal standard articulated by *Gertz*.

2. The Times attempts to downplay the outrageousness of the Fourth Circuit's standard by arguing that Hatfill would fare no better under a *Gertz* inquiry properly focused on his alleged participation in the particular controversy surrounding the anthrax murders. But the record is clear that, after the attacks, Hatfill did no more than respond to a handful of inquiries from reporters who wanted to accuse him of murder. For example, Hatfill "spoke with" reporters from ABC who *sought out Hatfill* in an attempt to confront him with an accusation of murder. *See* Pet. 5. The Times does not (and cannot) deny that this is what happened, but claims that the facts were "inadmissible 'evidence.'" Opp. 26. This case, however, was decided on summary judgment and "facts" (which are flatly untrue) may not properly be assumed *against* Hatfill.

The Times' claim that Hatfill had an "apparently insatiable appetite for lunches, dinners and other voluntary interactions with reporters following the

attacks," *Id.* at 26, is another half-truth. The meetings to which The Times refers *all occurred after Kristof's accusations had been made.* Hatfill did "voluntarily interact" with a handful of reporters then to vociferously deny that he was the anthrax killer. But individuals accused of murder are highly motivated to deny such accusations, quite apart from culinary enticements, and that does not for a moment suggest that Hatfill "voluntarily" thrust himself into the controversy surrounding the anthrax investigation. Pet. 17-18.

3. The Times fails to reconcile the divergent circuit court cases addressed by the petition. *Id.* at 18-24. As we showed, courts applying *Waldbaum*'s three-pronged approach – which begins by "isolat[ing] the public controversy" – find that a "general concern or interest" reflected in a broad debate "will not suffice" to constitute a particular public controversy under *Gertz*. *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296-97 (D.C. Cir. 1980). On the other hand, courts applying the looser approach to identifying a public controversy find public appearances "relating to" a broad controversy sufficient to justify public figure status. *See, e.g., Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123, 136-37 (2d Cir. 1984) (finding false allegations that an author of "racy" books appeared in an orgy scene in an adult movie sufficiently related to a broad "controversy" about gender equality). This Court should articulate a standard for identifying limited purpose public figures such that different circuit courts will reach similar results on similar facts.

II. THE FOURTH CIRCUIT'S "ACTUAL MALICE" HOLDING WARRANTS REVIEW.

1. Hatfill argued at length in the court of appeals that malice was shown by Kristof's false claims that Hatfill (1) dispensed Cipro to visitors to a "safe house," (2) failed three FBI polygraph examinations, (3) used an "alias" (which Kristof failed to disclose was "Hatfield"), and (4) was identified by bloodhounds with inherently improbable powers.[1] As this Court recognized in *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968), a jury is likely to conclude that fabrication shows actual malice. If a reporter is confident of the truth of his assertion, there is no reason to distort the facts to make the allegation seem stronger than it is. Yet the Fourth Circuit failed even to mention the four claims Hatfill emphasized as showing malice.

Below, Hatfill and The Times disputed whether a defamation plaintiff must show that false allegations were *completely* or only *partially* fabricated. *See* Times Br. 58; Hatfill Reply Br. 29 & n.10. The Fourth Circuit's decision concluded that some non-fabricated evidence implicated Hatfill, Pet. App. 24a, stated that a defamation plaintiff must show that allegations were "*completely* fabricated," emphasizing "completely," *id.* at 25a, and failed to address the four false statements

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[1] The Times suggests that our evidence of malice relies on statements in Kristof's May 2002 column, which it claims makes reliance on them "time-barred." Opp. 15 n.7. That contention is wrong for many reasons, but it suffices to note that the four false allegations Hatfill emphasized come from later columns. *See* Pet. App. 76a (July 2 column) (Cipro and the "alias"), 87a (August 13 column) (polygraphs and bloodhounds).

mentioned above. The Times says (Opp. 36) that the Fourth Circuit found that Hatfill's evidence, "even if credited," does not establish malice, but the court said no such thing. That is how the court should have proceeded – to review all the evidence and consider it in the aggregate – but because it applied the wrong legal standard that is not what it did.

Nor is there merit to The Times' contention *(Id.* at 29) that the Fourth Circuit's decision on this point is "derived directly from *St. Amant*." There this Court stated that a jury is likely to find malice "where a story is fabricated by the defendant." 390 U.S. at 732. But there is a world of difference between saying that a jury will find malice where a story is "fabricated" and saying that a jury can consider malice only if a story is "*completely* fabricated." *See Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 692 n.37 (1989) (noting "[t]he defamer may be [all] the more successful when he baits the hook with truth") (citations omitted).[2]

2. The bulk of The Times' discussion of malice is devoted to presenting a one-sided version of the facts. Even apart from the fact that "[o]n summary judgment, we must draw all justifiable inferences in favor of the nonmoving party," *Masson*, 501 U.S. at 520, The Times' attempted rebuttal is feeble. With respect to the false allegation that Hatfill dispensed

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[2] The Times notes that the court's statement that a *complete* fabrication is required also recognized other possible means of establishing malice, such as reliance on "an unverified anonymous telephone call." Opp. 29 (citations omitted). Here, no anonymous calls are at issue; the question is whether partially fabricated claims establish malice.

Cipro – an antibiotic used to treat anthrax – to visitors to a "safe house," The Times responds by contending that it is "undisputed that Cipro was discussed by Hatfill." Opp. 33. *Discussed*? The sting of Kristof's allegation was that Hatfill *dispensed* Cipro to visitors to the "safe house," suggesting that he had used the location to convert wet anthrax to its dangerous dry state. The Times will be free to argue to a jury that Kristof's allegation was essentially true because Hatfill *discussed* Cipro at the safe house and unrelatedly *dispensed* Cipro elsewhere, but a jury is unlikely to agree.

The Times similarly has no answer to the false allegation that Hatfill failed three FBI polygraph examinations. As matters stand, The Times may not claim that FBI agents told Kristof that Hatfill failed three polygraph examinations because Kristof disobeyed a court order to identify the agents. The Times will be required at trial to rely on its defense that the claim is true because Hatfill's FBI polygraph "involved more than one test sequence." *Id.* at 35 (citation omitted). A jury would rightly conclude, if Kristof testifies that he said Hatfill failed three polygraph examinations because he took one test with three parts, that such a claim itself shows reckless disregard for the truth.[3]

With respect to the Hatfield "alias," The Times shamelessly blames Kristof's research assistant for the

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[3] Citing JA224, The Times alleges that there is an FBI record that refers to a "second polygraph." Opp. 35. The handwritten statement says "record polygraph."

untruth. *See id.* at. 34. But it is undisputed that Kristof knew that the alleged "alias" was "Hatfield." A jury could reasonably conclude that Kristof concealed this important fact from his readers because an allegation that a person has an alias supports the assertion that he has committed a crime, but an assertion that a person named "Hatfill" sometimes gets called "Hatfield" merely shows that mistakes happen.

With respect to the bloodhounds, any competent reporter would have questioned whether a bloodhound can obtain a scent from an eleven-month-old envelope that had been irradiated and was known not to have any DNA. And another reporter had already debunked a key part of the bizarre story – that the bloodhounds alerted in a Denny's restaurant in Louisiana where Hatfill had dined – by calling all of the Denny's restaurants in Louisiana and determining that there had been no visits by bloodhounds. JA1951. He also quoted "[t]hree veteran bloodhound handlers" who were "skeptical that a useful scent ... would ... remain[] on the letters." *Id.* Kristof nevertheless reported that bloodhounds "responded strongly to Dr. Hatfill ... as well as to restaurants that he had recently entered." Pet. App. 87a. A jury could reasonably conclude that Kristof recklessly included the story because he thought it added credence to his accusation of Hatfill.[4]

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[4] The Times complains that the bloodhound evidence and some of the other statements showing malice were not "alleged to be false in Hatfill's Complaint." Opp. 32. This is nonsense. Evidence relating to malice is usually obtained during discovery, and there

The Times also argues that Kristof reasonably relied on allegations he heard from others, primarily Barbara Rosenberg. But Kristof was warned by *three* people not to trust Rosenberg. One of Kristof's colleagues at The Times, William Broad, emailed Kristof that if the allegation that Hatfill made the anthrax at an isolated "safe house" came "from Barbara i would be very suspicious." JA1881. Another colleague, Judith Miller, told Kristof that Rosenberg was "vindictive" and "prone to fabrication." JA1921. And one of Kristof's other sources warned Kristof not to "believe everything Barbara says." JA1861. A jury should decide whether, in light of these warnings, Kristof had doubts about Rosenberg's claims or recklessly advanced them.

3. The holding below is inconsistent with numerous decisions of this Court and other courts of appeals. The Times discusses only one of the cases we cited in our petition, contending that *Harte-Hanks* is distinguishable because the newspaper in that case failed to interview "the one person who could corroborate [the] defamatory claims." Opp. 33, n.20. Here, the logical person to contact was the owner of the alleged safe house, George Borsari, and Kristof failed to do so, so the case is not distinguishable on the ground advanced by The Times.

In the petition, we showed that the holding below is inconsistent with *Masson*, *Rebozo*, and *Crane*. The Times cites none of those cases. As we showed, there

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is no requirement (or reason) why facts relating to malice must be included in a complaint.

was a basis in fact for the defamatory allegations in each of those cases – a stronger basis than here – so the allegations were not *completely* fabricated. But this Court, the Fifth Circuit, and the Ninth Circuit held that the plaintiff in each case had presented evidence on which a reasonable jury might conclude that the defamer had doubted the truth of his allegation or acted recklessly – evidence that was considerably less extensive than the evidence presented by Hatfill. The decision below cannot be reconciled with any of these three cases.

In *Tavoulareas*, the en banc D.C. Circuit held that defamation plaintiffs are "entitled to an aggregate consideration of all their evidence." 817 F.2d at 794 n.43. In the petition, we noted that the "aggregate consideration" issue is an important and recurring issue, and explained that the Fourth Circuit's approach cannot be reconciled with the D.C. Circuit's approach. The Times' silence with respect to *Tavoulareas* and the other cases further shows that there is a conflict warranting this Court's attention.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

CHRISTOPHER J. WRIGHT*
THOMAS G. CONNOLLY
MARK A. GRANNIS
TIMOTHY J. SIMEONE
CHRISTOPHER P. NIERMAN
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 730 1300
* *Counsel of Record*

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